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No. 02-639

IN THE

Supreme Court of the United States

PATRICIA C. ANDERSON, MICHAEL A. HOSEIN, and STEPHEN E. PARKER,

Petitioners,

v.

ALEXANDER F. TREADWELL, as Secretary of State of the State of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held that the standard of intermediate scrutiny set forth in *Central Hudson* applies in assessing a First Amendment challenge to a New York regulatory scheme that protects residential privacy and prevents "blockbusting" by allowing homeowners in specified areas of the State to elect not to receive in-home real estate solicitations?

2. Whether the Second Circuit's application of the *Central Hudson* test was inconsistent with the decisions of this Court or of the other Courts of Appeal?

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STATEMENT OF THE CASE

Petitioners Patricia C. Anderson, Michael A. Hosein, and Stephen E. Parker, real estate professionals licensed by the New York Department of State, seek this Court's review of a decision of the United States Court of Appeals for the Second Circuit that rejected petitioners' First Amendment challenge to New York Real Property Law § 442-h(3) and its implementing regulations. Section 442-h(3) authorizes respondent the Secretary of State of the State of New York, upon finding that owners of residential property within a defined geographic zone have been subject to "intense and repeated solicitation" by real estate professionals, to establish "cease and desist zones" through the promulgation of a regulation. Owners of residential property within a cease and desist zone may inform the Secretary of State that they do not wish to receive real estate solicitations.

The Secretary of State compiles a list of residents within each cease and desist zone who have affirmatively elected to avail themselves of the statute's protection. Real estate professionals are prohibited from directly soliciting residents on the list by mail, by telephone, or in person. N.Y. Real Prop. L. § 442-h(3)(a); N.Y. Comp. Codes R. & Regs. tit. 19, § 175.17(c)(1), (d)(1). The ban on solicitations does not include classified advertisements in periodicals that are not primarily real-estate related, advertisements placed in public view, or radio and television advertisements. *Id.* § 175.17(d)(2). A rule establishing a cease and desist zone is effective for five years, after which it may be re-adopted by the Secretary of State or it will expire. N.Y. Real Prop. L. § 442-h(3)(c). The areas that are currently designated as cease and desist zones comprise certain neighborhoods in Bronx,

Nassau, and Kings Counties, and all of Queens County. The locations of these zones are specified at N.Y. Comp. Codes R. & Regs. tit. 19, § 175.17(c)(2).

A. Background.

New York Human Rights Law § 296(3-b), enacted in 1969, outlaws "blockbusting" — the practice of soliciting real estate sales and listings by representing that a change in the racial, ethnic, or religious character of a block, neighborhood, or area has occurred, or will or may occur. N.Y. Exec. Law § 296(3-b). The State has found that it is difficult to prosecute blockbusting directly. Blockbusting statements tend to be oral, raising difficult issues of proof. In addition, the statements may contain suggestions to sell before it is "too late" or innuendoes about "the neighborhood changing," without directly mentioning the race, ethnicity, or religion of newcomers.

In 1989, the Legislature concluded that this ban was inadequate to prevent blockbusting and, in order to aid enforcement efforts, enacted Real Property Law § 442-h. In explaining why additional legislation was necessary, the Legislature stated:

> The legislature finds that, from time to time, homeowners in some neighborhoods in the state of New York have been subjected to intense and repeated solicitation by real estate brokers and salespersons to place their homes for sale with such brokers and salespersons with the implication that property values will be decreasing because persons of different ethnic, social or religious background are moving or are about to move into

> the neighborhood in greater numbers. This type of solicitation technique constitutes a churning of the market and generates panic selling in the neighborhood. In such a charged atmosphere, mention of the ethnic, social or religious background of the prospective buyer becomes unnecessary.

1989 N.Y. Laws, ch. 696, § 1.

Section 442-h sets forth two alternative ways in which the Secretary of State may act. First, § 442-h(2) permits the Secretary of State, upon finding after public hearing and investigation that a defined geographic area is subject to blockbusting, to issue a "nonsolicitation order" (promulgated as a regulation) forbidding real estate professionals (*i.e.*, real estate brokers, salespersons, or other persons regularly engaged in the trade or business of buying or selling real estate) from soliciting real estate listings or sales from all homeowners in the area. Such an order may prohibit any or all types of solicitation directed to particular homeowners. Second, § 442-h(3), the provision at issue in this case, authorizes the Secretary of State, upon finding that a defined geographic area has been subjected to "intense and repeated" real estate solicitation, to establish a "cease and desist zone" within which real estate professionals are prohibited from directing in-home solicitations only to those homeowners who have indicated to the Secretary of State that they do not wish to receive such solicitations.

In 1991, the Second Circuit held that a nonsolicitation order issued by the Secretary of State pursuant to § 442-h(2) violated the First Amendment. *New York State Ass'n of*

Realtors v. Shaffer, 27 F.3d 834 (2d Cir. 1994).[1] Applying *Central Hudson*'s test for analyzing restrictions on commercial speech, the Second Circuit concluded that although the State had provided some evidence that the areas covered by the non-solicitation order had been subjected to blockbusting, that evidence did not suffice to justify a blanket prohibition on all solicitation of homeowners in those areas. *Id.* at 843-44. The court explained that the State had failed to demonstrate that less restrictive means, such as the cease and desist orders authorized by § 442-h(3), would not have been effective in combatting the demonstrated level of blockbusting. *Id.* at 844; *see also* App. 13a ("In *NYSAR*, this Court, in invalidating a broader prohibition on real estate solicitations, characterized the cease-and-desist registry as a 'type of narrower, resident activated measure,' that was reasonably tailored, yet still effective."). There are currently no § 442-h(2) nonsolicitation orders in effect in New York.

The Secretary of State has instead designated five "opt-in" cease and desist zones under § 442-h(3). Most of the current cease and desist zones were first designated in

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1. Petitioners' claim that "the Second Circuit held that subsection 442-h(2) violates the First Amendment" (Cert. Pet. at 6 n.1) is incorrect. Rather, the court stated:

> [W]e believe that the Realtors' position on this appeal . . . is in reality a facial challenge to the specific nonsolicitation regulation promulgated under the statute, rather than a facial attack on the statute itself. Accordingly, we confine our First Amendment inquiry to the narrow issue of whether the challenged regulations promulgated by the Secretary pursuant to statutory authority, particularly the nonsolicitation regulation, are valid governmental restrictions on speech.

27 F.3d at 839.

1994 after public hearings and, because a regulation establishing a cease and desist zone is valid for only five years, have since been re-designated.

During periods of public comment preceding the most recent re-designations, the Secretary received hundreds of informal complaints and petitions from individual citizens. The record developed during that comment period is replete with complaints about explicit and implicit blockbusting tactics. For example, there were reports of explicit racial appeals, such as "the neighborhood is getting black" and references to "minorities" moving in. Homeowners also reported references by real estate professionals to "cultural changes in the community," declining property values, and new neighbors with names like "Sanchez, Gonzales, [and] Diallo." The record also documents numerous complaints about the intrusive and harassing nature of in-home real estate solicitations, by mail, telephone, and in person. Homeowners reported that they had been "inundated," "bombarded," "bothered," "hounded," and "deluged" by real estate solicitations in their homes. In a petition urging the Secretary to maintain cease and desist zones in their community, more than 250 residents described the zones as their "only defense" against "unscrupulous real estate brokers." Approximately 20,000 homeowners residing within the cease and desist zones have asked to be placed on the registry maintained by the Department of State. More than 800 homeowners have lodged formal complaints of violations of the cease and desist registry since 1997.

B. The Proceedings Below.

Petitioners filed suit in the United States District Court for the Eastern District of New York. They sought a judgment declaring that § 442-h(3), on its face, and as applied, as well

as the regulations promulgated pursuant thereto, violate their rights under the First Amendment. The district court granted petitioners' motion for summary judgment, and denied respondent's cross-motion for summary judgment, holding that § 442-h(3) and its implementing regulations are unconstitutional. App. 18a-19a, 26a.

Relying on *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), the district court concluded that § 442-h(3) was a "content-based" restriction on speech and therefore subject to strict scrutiny. App. 22a-23a. Insofar as it was designed to protect residential privacy, the district court found the challenged provision underinclusive, "since it does not proscribe solicitation by other classes of solicitors." App. 25a. The court further found that the statute did not "reasonably fit" the problem it sought to remedy because the court believed that other types of "content-neutral" restrictions could better protect the state's interest in protecting residential privacy. App. 25a-26a. The district court failed to even mention, let alone analyze, respondent's argument that the statute is justified based on the State's interest in preventing blockbusting.

On appeal, the Second Circuit reversed. Turning first to the question of what level of scrutiny should be applied, the court concluded that the type of speech regulated by § 442-h(3) belonged "squarely in[] the category of commercial speech." App. 8a. While acknowledging that some Justices have questioned the appropriateness of *Central Hudson* for certain categories of commercial speech cases, the Second Circuit noted that this Court has continued to apply *Central Hudson*'s intermediate scrutiny standard, rather than strict scrutiny, in evaluating challenges to content-specific regulations of commercial speech. App. 8a-9a

(citing *Thompson v. Western States Med. Ctr.*, 122 S. Ct. 1497, 1503-04 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001)).

The Second Circuit then proceeded to apply the *Central Hudson* test. Examining whether the government had advanced a substantial state interest in support of § 442-h(3), the court observed that the State had identified two interests served by the provision: "(1) the State's interest in protecting neighborhoods from blockbusting, and (2) the State's interest in protecting the privacy of homeowners from harassing in-home real estate solicitations." App. 10a. Relying on numerous precedents of this Court, as well as on the State's assertion that many homeowners feel "harassed, overwhelmed, threatened, and offended by the extensive telephonic, mail, flyers, and personal direct solicitation they receive," the Second Circuit concluded that the State's interest in protecting homeowners from harassing solicitations is substantial — a point which petitioners do not dispute. *See* Cert. Pet. at 17. The court stated that "[b]ecause the State's regulatory scheme is sustainable solely on the homeowners' privacy interest, we need not consider the interest in avoiding blockbusting." App. 10a.[2]

Next, the Second Circuit examined the third and fourth steps of the *Central Hudson* test, *i.e.*, whether the regulation directly advances the State's interest, and whether there is "a reasonable fit between the legislature's ends and the means

2. In *New York State Ass'n of Realtors v. Shaffer*, the Second Circuit had held that "the governmental interest in the promotion of stable, racially integrated communities through the elimination of the pernicious practice of blockbusting is a 'vital goal.'" 27 F.3d at 841 (quoting *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 94-95 (1977)).

chosen to accomplish those ends." App. 11a. The cou
emphasized that the State's burden could not be satisfied b
"mere speculation or conjecture," but rather that it mu
demonstrate that "the harms it recites are real" and that th
restrictions at issue "will in fact alleviate them to a materi
degree." App. 11a-12a.

The court found that the asserted harm to homeowner
residential privacy from real estate solicitations was inde
real, and that the cease and desist zones directly a
materially advance the State's interest in alleviating th
harm. In support of this conclusion, the court pointed
evidence of the popularity of the program, statements
public hearings in support of the cease and desist zones, a
complaints regarding solicitation of homeowners who h
placed their names on the cease and desist lists. App. 12a

Turning to the issue of "reasonable fit," the Secc
Circuit found that the regulation could not be faulted for be
more extensive than necessary, because "it is precis
co-extensive with those who are experiencing the particu
harm that it is designed to alleviate." *Id.* The court obser
that this type of "resident-activated restriction" has b
endorsed by this Court in such cases as *Rowan v. Uni*
States Post Office Department, 397 U.S. 728, 737 (19
and *Playboy*, 529 U.S. at 815, as a less restrictive alterna
to an outright ban on the speech in question.

In rejecting the district court's contrary conclusion
§ 442-h(3) is fatally underinclusive, because it applies
to real estate solicitations, the Second Circuit noted that u
this Court's decisions, the underinclusiveness
commercial speech restriction does not necessarily de
the contention that the restriction materially advances a

interest. App. 13a-14a. The Second Circuit also distinguished numerous cases, including *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), in which this Court has invalidated commercial speech restrictions for lack of a reasonable fit. App. 14a-15a. It further indicated that its decision did not conflict with the Seventh Circuit's ruling in *Pearson v. Edgar*, 153 F.3d 397 (7th Cir. 1998), which involved a broader restriction on real estate solicitations. It noted that in contrast to this case, the Seventh Circuit relied on a factual finding that the state had failed to produce evidence of any actual harm to residential privacy from real estate solicitation.

Finally, the Second Circuit explained that insofar as some restrictions on commercial speech may be vulnerable to challenge as being paternalistic, the cease and desist provisions avoid that concern because they apply only where homeowners choose to take advantage of their protection. App. 16a (citing *Western States Med. Ctr.*, 122 S. Ct. at 1507, and *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring in judgment)).

The Second Circuit did not address respondent's argument that the constitutionality of § 442-h(3) could also be supported by the State's interest in preventing blockbusting.

REASONS FOR DENYING THE PETITION

Petitioners have failed to identify any grounds warranting a grant of certiorari in this case. They first assert that the Court should hear the case in order to revisit whether *Central Hudson*'s intermediate scrutiny standard should apply to regulation of truthful, non-misleading commercial speech that is not intended to prevent commercial harms or protect a fair bargaining process. This case, however, presents none of the factors that have led some members of the Court to

question whether certain types of commercial speech restrictions should be subject to greater scrutiny than is mandated by *Central Hudson*. It therefore would not afford the Court a meaningful opportunity for resolving those concerns.

Nor does the Second Circuit's application of *Central Hudson* conflict with any decisions of this Court or the other Courts of Appeals. The decision below fully comports with relevant commercial speech precedents and is plainly distinguishable on the facts from the Seventh Circuit's decision regarding an anti-blockbusting statute in *Pearson v. Edgar*. Petitioners' arguments to the contrary are nothing more than a request for error correction by this Court.

In any event, this case would provide a poor vehicle for any further refinement of the *Central Hudson* framework. Neither of the courts below addressed the State's interest in preventing blockbusting. Resolution of petitioners' claim — and even of whether § 442-h(3) was appropriately subject to intermediate scrutiny as a regulation intended to prevent commercial harm and protect the bargaining process — would require this Court to evaluate the anti-blockbusting interest asserted by the State without the aid of any analysis by the lower courts. Accordingly, the petition for a writ of certiorari should be denied.

I. THE PRESENT CASE DOES NOT PROVIDE OCCASION FOR THIS COURT TO REVISIT THE APPLICABILITY OF *CENTRAL HUDSON*'S INTERMEDIATE SCRUTINY STANDARD.

For more than 20 years, this Court has consistently applied the intermediate scrutiny called for in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), in assessing First Amendment challenges to regulations of commercial speech, including in cases directly analogous to this one.[3] Although several members of the Court have expressed concerns about the applicability of this standard, the factors that motivated these reservations are wholly absent here. Finally, petitioners' contention that strict scrutiny is appropriate in the present case is predicated on their assertion that § 442-h(3), insofar as it is designed to protect residential privacy, is not aimed at preventing

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3. Petitioners contend that "[i]n disagreement with the Seoncd Circuit, other lower courts have applied strict scrutiny to content-based commercial speech restrictions." Cert. Pet. at 13 n.6. But in *MD II Entertainment v. City of Dallas*, 28 F.3d 492 (5th Cir. 1994), the Fifth Circuit applied intermediate scrutiny in invalidating the challenged restriction: "Because we conclude that, on the record before us, § 14-1(5)(B) does not survive the intermediate scrutiny of *Central Hudson*, we need not consider whether that test, rather than the strict scrutiny of [*R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)], must guide our inquiry." *Id.* at 495. In *Citizens United for Free Speech II v. Long Beach Township Board of Commissioners*, 802 F. Supp. 1223 (D.N.J. 1992), the district court, relying on *R.A.V.*, held that content-based restrictions on commercial speech are subject to strict scrutiny. That decision's interpretation of *R.A.V.* simply cannot be reconciled with this Court's subsequent commercial speech jurisprudence. *See, e.g.*, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 622-24 (1995).

commercial harm or protecting the bargaining process. But this Court has consistently held that restrictions on solicitation designed to protect residential or consumer privacy are in fact subject to intermediate scrutiny.

A. This Court Has Applied *Central Hudson*'s Intermediate Scrutiny Standard in Analogous Cases Involving Solicitation by Professionals

The regulation challenged in the present case — which permits homeowners, in geographic areas that the Secretary of State has found to have been subjected to "intense and repeated solicitation" by real estate professionals, to affirmatively elect not to receive in-home real estate solicitations — falls squarely within the range of restrictions of commercial speech as to which the Court has repeatedly held that intermediate scrutiny is appropriate. *See Thompson v. Western States Med. Ctr.*, 122 S. Ct. 1497, 1504 (2002) ("Although commercial speech is protected by the First Amendment, not all regulation of such speech is unconstitutional. In *Central Hudson*, *supra*, we articulated a test for determining whether a particular commercial speech regulation is constitutionally permissible.").[4]

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4. Petitioners' assertion that "a majority of this Court has concluded that *Central Hudson* does not state the appropriate test for content-based restrictions on non-deceptive commercial speech" (Cert. Pet. at 13) is contradicted by *Western States Medical Center*, the Court's most recent commercial speech decision. The Court, while acknowledging that several Justices have expressed doubts about the *Central Hudson* analysis and its applicability in particular cases, nonetheless stated: "'*Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision.'" (Cont'd)

As the Second Circuit observed, this Court has applied *Central Hudson* in evaluating restrictions on solicitations by professionals that are directly analogous to those challenged here. This Court has held that solicitation by professionals such as attorneys or accountants is core commercial speech, and has made clear that protection of the privacy of residents and consumers from unwanted solicitations is a proper motivation for the regulation of such speech. These cases reference none of the reservations about *Central Hudson* to which petitioners point in seeking certiorari.

For example, in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), the Court considered whether rules of the Florida Bar which prohibited personal injury lawyers from sending targeted direct-mail solicitations to accident victims and their relatives for 30 days following an accident violated the First Amendment. The Florida Bar contended that the restriction was supported by its interest in "protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers," which related to the Bar's concern with maintaining the reputation of the legal reputation in the eyes of the public. *Id.* at 624. After observing that the solicitations in question clearly constituted commercial speech, the Court explained: "we engage in 'intermediate' scrutiny of restrictions on commercial speech, analyzing them under the framework

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(Cont'd)

Western States Med. Ctr., 122 S. Ct. at 1504 (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001) (quoting *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999))). In *Western States Medical Center*, the restriction in question undeniably was content-based and there was no contention that the prohibited speech was misleading. *Id.*

set forth in [*Central Hudson*]." *Id.* at 623. The dissent agreed with the majority that *Central Hudson* provided the appropriate framework for analyzing the restriction. *Id.* at 636 (Kennedy, J., dissenting).

Likewise, in *Edenfield v. Fane*, 507 U.S. 761, 767 (1993), the Court, in considering the constitutionality of a Florida Board of Accountancy rule prohibiting direct, in-person, uninvited solicitations by certified public accountants, applied *Central Hudson*'s intermediate standard of review to the challenged restriction. In supporting the constitutionality of the ban on solicitation, the Board had relied upon the state's interest in protecting consumers from fraud and intrusions on privacy, and on the state's interest in preserving the fact and appearance of CPA independence in performing audits. *Id.* at 768.

B. None of the Factors That Have Led Some Members of This Court to Question the Applicability of Strict Scrutiny are Present Here

To be sure, as petitioners point out, several Justices have questioned whether certain types of commercial speech regulations should be subjected to greater scrutiny than is called for by *Central Hudson*. Section 442-h(3), however, does not implicate these concerns, and thus it does not provide a useful vehicle for resolving any such doubts about *Central Hudson*.

First, insofar as some Justices have expressed concern about commercial speech restrictions motivated by paternalism or the desire to keep would-be recipients "in the dark," *see, e.g.*, *Western States Med. Ctr.*, 122 S. Ct. at 1507;

id. at 1509 (Thomas, J., concurring); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999); *Rubin v. Coors Brewing*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring in judgment), § 442-h(3) avoids that concern by prohibiting only solicitations directed to homeowners who have informed the Secretary of State that they do not wish to receive them.

Moreover, the challenged regulation does not impose a blanket ban on commercial speech, which some Justices have identified as possibly warranting greater scrutiny. As petitioners point out, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996), Justice Stevens, joined by Justices Kennedy and Ginsburg, suggested that a stricter level of scrutiny may be appropriate "when a State entirely prohibits the dissemination of truthful, non-misleading commercial messages for reasons unrelated to the preservation of a fair bargaining process." Section 442-h(3), however, does not fit this description. New York does not "entirely prohibit[] the dissemination" of the commercial speech in question. Rather, § 442-h(3) prohibits in-home solicitations only of homeowners who have indicated to the Secretary of State that they do not wish to receive such solicitations. Moreover, the implementing regulation explicitly excludes from its ban any classified advertisements in periodicals that are not primarily real-estate related, advertisements placed in public view, and radio and television advertisements. N.Y. Comp. Codes R. & Regs. tit. 19, § 175.17(d)(2). *Cf. 44 Liquormart*, 517 U.S. at 502 (in *Florida Bar*, "we upheld a 30-day prohibition against a certain form of legal solicitation largely because it left so many channels of communication open to Florida lawyers").

Finally petitioners contend that insofar as § 442-h(3) is justified by the State's interest in protecting residents' privacy,

it does not address commercial harms or protect the bargaining process, and therefore should be subjected to strict scrutiny. This Court's decisions in cases involving professional solicitation do not support petitioners' view that protecting residential privacy is an insufficient justification for a commercial speech regulation. Rather, this Court has consistently recognized that protecting residential and consumer privacy is an appropriate "substantial state interest" for purposes of justifying a commercial speech regulation under *Central Hudson*. As the Court explained in *Edenfield*: "[T]he protection of potential clients' privacy is a substantial state interest. Even solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient." 507 U.S. at 769; *see also Florida Bar*, 515 U.S. at 625 ("'the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society'" (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980))); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 (1977) (recognizing "legitimate and important state interest" in protecting public from "those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct'").

II. THE SECOND CIRCUIT'S APPLICATION OF *CENTRAL HUDSON* DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR THE OTHER COURTS OF APPEALS.

Petitioners erroneously contend that the Second Circuit's decision conflicts with this Court's decisions and with the Seventh Circuit's decision in *Pearson v. Edgar*, 153 F.3d 397 (7th Cir. 1998). To the contrary, the Second Circuit's application of *Central Hudson* was straightforward and fully

consistent with this Court's commercial speech precedents, and the Seventh Circuit's decision is plainly distinguishable on its facts.

Central Hudson includes four steps for determining the constitutionality of a commercial speech restriction:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Lorillard, 533 U.S. at 554 (quoting *Central Hudson*, 447 U.S. at 566).

Petitioners claim to have identified two ways in which the Second Circuit's application of this test allegedly departed from the relevant precedent. First, relying on *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), and the Seventh Circuit's decision in *Pearson*, they allege that the Second Circuit should have held that § 442-h(3) is underinclusive in that it does not bar all in-home solicitations that might intrude on residential privacy, and therefore that it fails to satisfy the third and fourth elements of the test. Second, pointing to several Supreme Court decisions invalidating resident-activated measures, they contend that the Second Circuit should have held that because § 442-h(3) is allegedly underinclusive and content-based, the statute fails to satisfy the "reasonable fit" requirement.

The Second Circuit's decision, however, is consistent with the decisions of this Court and *Pearson*. Regardless, this argument amounts to nothing more than a request for error correction, and thus does not merit a grant of certiorari.

A. The Second Circuit's Application of *Central Hudson* Is Consistent With *Discovery Network* and *Pearson*

Petitioners rely primarily on an asserted conflict between the decision below and this Court's decision in *Discovery Network* and the Seventh Circuit's decision in *Pearson*. For the Second Circuit to have been consistent with these decisions, they claim, it would have had to hold that § 442-h(3) does not "directly advance" a substantial governmental interest and lacks a "reasonable fit" because it is underinclusive. The Second Circuit, however, correctly distinguished both *Discovery Network* and *Pearson*.

In *Discovery Network* this Court considered the constitutionality of Cincinnati's policy of banning the distribution of "commercial handbills" through freestanding newsracks located on public property, while permitting the distribution of "newspapers" through the same means. The city contended that the restriction was designed to further its interest in maintaining the safety and appearance of its streets, and that applying the ban to commercial handbills but not newspapers was justified by the lower level of First Amendment protection given to commercial speech as compared to non-commercial speech. Applying *Central Hudson*, this Court concluded that there was not a "reasonable fit" between the restriction and the state interest it sought to advance:

> In the absence of some basis for distinguishing between "newspapers" and "commercial handbills" that is relevant to an interest asserted by the city, we

> are unwilling to recognize Cincinnati's bare assertion that the "low value" of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing "commercial handbills." Our holding, however, is narrow. . . . [W]e do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks.

As the Second Circuit recognized, the present case does not fall within the holding of *Discovery Network* because New York does have legitimate reasons for deciding to regulate in-home real estate solicitations differently from other types of in-home solicitations. First, as the Second Circuit pointed out, "the cease-and-desist zones have been identified because of the high volume of citizen complaints about *real estate solicitations* sent to homes" in those areas. App. 15a (emphasis added). Second, this Court has long recognized that "'States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.'" *Florida Bar*, 515 U.S. at 625 (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975)). That a state chooses to regulate solicitation by members of one profession differently from how it regulates solicitation by members of a different profession is not grounds for invalidating the regulation, so long as the regulation meets the requirements of *Central Hudson*. Thus, in *Florida Bar* and *Edenfield*, the Court considered the constitutionality of restrictions on solicitations by

attorneys and accountants, respectively, without suggesting that those restrictions were suspect because they only applied to members of those professions.

The Seventh Circuit's decision in *Pearson* is similarly distinguishable. In *Pearson*, the Seventh Circuit considered the constitutionality of an Illinois statute that regulated real estate solicitation by permitting homeowners to notify real estate agents that they did not wish to be solicited. Solicitation of a homeowner by an agent who had notice of the homeowner's wish not to be solicited was a criminal offense. 153 F.3d at 399. Illinois contended that the statute furthered its interests in preventing blockbusting and preventing residential privacy. The district court's findings of fact directly contradicted the State's assertion: "blockbusting and panic peddling rarely, if ever, occur in Illinois today," and "the defendants produced no evidence in this case that real estate solicitation harms or threatens to harm residential privacy." *Id.* at 400. Relying expressly on these factual findings, the Seventh Circuit held that the statute failed to materially advance the state's asserted interests. *Id.* at 402, 404.

The distinctions between *Pearson* and the present case are clear and dispositive, as the Second Circuit observed. In *Pearson*, the regulation of real estate solicitation applied statewide, while in the present case the cease and desist regulation applies only in areas in which the Secretary of State has found homeowners to have been subjected to "intense and repeated" real estate solicitation. Moreover, in *Pearson* the Seventh Circuit relied on the factual finding that the record contained no evidence that real estate solicitation harmed residential privacy, explaining: "Absent such evidence, a mechanism whereby homeowners can reject real

estate solicitation but not other kinds of solicitation cannot be said to advance the interest in residential privacy 'in a direct and material way.'" *Id.* at 404 (quoting *Edenfield*, 507 U.S. at 767).

In the present case, by contrast, the Second Circuit found that "[t]he record adequately demonstrates that the harm to homeowners' privacy from real estate solicitations is real, and that the cease-and-desist zones advance that interest directly and to a material degree." App. 12a. As the court explained, "[t]he popularity of the program, statements at the public hearings in support of the cease-and-desist zones, and complaints of violations of the registry all support the contention that homeowners feel harassed by the amount and the intensity of the solicitations, *and that the cease-and-desist zones have alleviated that harm*." *Id.* (emphasis added). The records of the public hearings contained numerous complaints by homeowners being "bombarded," "hounded," "badgered," "inundated," and "deluged" by in-home *real estate* solicitations — by mail, telephone, and in person. Moreover, if, as petitioners suggest, real estate solicitation were no more burdensome to homeowners within the cease and desist zones than other forms of solicitation, the cease and desist zones would not have been found to be effective in alleviating the harm. In light of these fundamental distinctions between the two cases, petitioners' bald assertion that "[h]ad the Seventh Circuit addressed the New York law at issue here, it would have struck that law down," is insupportable.[5]

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5. Contrary to petitioners' suggestion, the Second Circuit's reliance on *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986), was neither improper nor essential to its decision. As petitioners point out, in *44 Liquormart*, the Court held (Cont'd)

B. The Second Circuit's Conclusion That Section 442-h(3), As a Resident-Activated Measure, Satisfies the "Reasonable Fit" Requirement Is Consistent With the Decisions Of This Court

Nor does the Second Circuit's conclusion that § 442-h(3), as a resident-activated restriction, satisfies the "reasonable fit" requirement of *Central Hudson* conflict with any other decisions of this Court. The decisions petitioners reference invalidating resident-activated speech restrictions are relevant merely for the proposition that the mechanism for implementing a speech restriction — *i.e.*, the fact that it is resident-activated rather than a flat-out ban — will not save it if it is otherwise unconstitutional. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, (1992) ("[A] State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.") (citations omitted).

Thus, if New York lacked a proper basis for regulating in-home real estate solicitations differently from other types

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(Cont'd)
that "*Posadas* clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy." 517 U.S. at 509. The Second Circuit did not rely on *Posadas* for this rejected proposition. Rather, the court cited *Posadas* (and several other decisions that have not been questioned) for the proposition that "underinclusiveness will not necessarily defeat a claim that a state interest has been materially advanced." App. 13a. In any event, because, as has been discussed, the factual record demonstrated that intense real estate solicitation was a particular problem in the areas designated as cease and desist zones, § 442-h(3), unlike the Illinois statute at issue in *Pearson*, is not underinclusive.

of solicitations, the fact that § 442-h(3) is resident-activated would not alone render it constitutional. As the Second Circuit found, however, the evidence below demonstrated that many homeowners in the cease and desist zones felt harassed and vexed by the amount of real estate solicitations they were receiving, and the establishment of the zones alleviated the problem. Given this legitimate basis for the restriction, the State's employment of the type of resident-activated mechanism that this Court has long favored, *see, e.g.*, *Village of Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 639 (1980) ("the provision permitting homeowners to bar solicitors from their property by posting [no solicitation] signs . . . suggest[s] the availability of less intrusive and more effective measures to protect privacy"), weighed strongly in favor of, not against, the Second Circuit's finding of a "reasonable fit."

III. THE NATURE OF THE LOWER COURT DECISIONS MAKES THIS CASE A POOR VEHICLE FOR REEVALUATING *CENTRAL HUDSON*'S INTERMEDIATE SCRUTINY STANDARD OR RESOLVING A CONFLICT.

Even if the Court were otherwise to determine that the circumstances of this case might warrant revisiting *Central Hudson*'s use of intermediate scrutiny or resolving a conflict, the nature of the lower courts' decisions makes this case a poor vehicle for doing so. Both the district court and the Second Circuit declined to consider respondent's alternative justification for § 442-h(3) — the prevention of blockbusting. While petitioners suggest that a lack of evidence of blockbusting in the record below precludes reliance on blockbusting as a rationale for the challenged provision, neither court below found that the record lacked evidence of

blockbusting. The record establishes that the State did introduce such evidence, including comments by residents at public hearings indicating that blockbusting tactics continued to be employed by real estate professionals.[6] Thus, if the Court were to grant certiorari, it would likely be required to evaluate the support for this asserted interest without the benefit of the lower court's factfinding or analysis, in order to resolve the constitutionality of the challenged restriction.

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6. Nor did the Second Circuit in *New York State Ass'n of Realtors v. Shaffer*, 27 F.3d 834 (2d Cir. 1994), find that the State had failed to prevent evidence of blockbusting. While, as petitioners note, the court did state that "the failure of the Secretary to provide direct and concrete evidence that the evil that the restriction purportedly aims to eliminate does, in fact, exist will doom the nonsolicitation regulation under *Central Hudson*," (Cert. Pet. at 9 n.3 (quoting *Shaffer*, 27 F.3d at 842), it is clear from the rest of the decision that the court was speaking hypothetically. Later in its opinion, the Second Circuit stated: "[T]his is not a record in which the Secretary failed to provide any evidence of blockbusting. Rather, the public hearings produced some evidence of the existence of a tangible harm that the Secretary is justified in trying to eliminate." 27 F.3d at 843.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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